TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 63

JACOB REED'S SONS, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED APRIL 14, 1926

(31,031)

(31,031)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 359

JACOB REED'S SONS, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. B-42

JACOB REED'S SONS, INC., Plaintiff,

v.

THE UNITED STATES, Defendant

I. PETITION—Filed March 18, 1922

To the Honorable the Court of Claims:

I

Plaintiff is and was during the period hereinafter mentioned, a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business in Philadelphia, in that state; and is and has been engaged in the manufacture of clothing, and uniforms, and also in the business of retailing clothing and other furnishings.

[fol. 2]

II

On and before the 15th day of July, 1918, plaintiff was manufacturing clothing, uniforms, overcoats, etc., intended for the Army of the United States by virtue of certain contracts with the Quartermaster Corps, United States Army, which contracts were entered into during the year 1917, and the first half of the year 1918. Said contracts provided that the plaintiff was to manufacture the said garments from materials furnished by the United States and the United States was to pay the price named in said agreement therefor. There was no stipulation in said contracts relative to facilities in the way of factories or store rooms to be required of plaintiff.

III

Prior to the date aforementioned, to-wit, July 15, 1918, plaintiff maintained several factories where it cut and manufactured the clothing it was obligated to manufacture under the contracts above mentioned. One plant was located on the third floor of a building at the corner of 8th and Arch streets, in the City of Philadelphia. The officers representing the United States objected to the use of this factory at 8th and Arch Streets on the ground of an alleged fire risk and practically required its discontinuance. Said officers of the United States also issued an order requiring plaintiff to install stock rooms [fol. 3] in all its said factories where government materials might be kept under lock in the custody of agents of the United States.

This requirement was practically impossible of fulfillment by plaintiff because if a storeroom of the kind required by the Government were installed, there would not have been enough room left in said factories to do the cutting necessary in the manufacture of said garments and, in addition to this, the requirement to discontinue its factory at 8th and Arch Streets would have curtailed seriously its production on its contracts and delayed their completion, whereas the Government was insisting that its production be increased. Nevertheless Government officers threatened that no further goods or supplies would be furnished unless such stock rooms were furnished. The contracts with the Government, above referred to, contained no requirement as to furnishing stock room or rooms by plaintiff. This requirement was made because officers of the United States found that a great deal of Government cloth was being stolen by dishonest contractors but no charge or imputation of dishonesty was made against plaintiff. On the contrary, plaintiff was on the list of approved Government contractors, its performance under its contracts having been in every way satisfactory to the Government, and was urged as a patriotic duty, to increase its output to the full extent of the potential capacity of its organization.

[fol. 4] IV

After the issuance of said requirements, plaintiff learned that it could lease for factory purposes for a period of not less than three years, the eighth floor of the Central Building, located at 44 N. 6th Street, Philadelphia, and that it could purchase sufficient machinery and fixtures to equip it as a going factory. To install its factory there would enable it to comply with the Government requirement of the installation of a stock room, to abandon its factory at 8th and Arch Streets, and would further enable it, as requested by the Government, to increase its output in supplying garments then sorely needed by the Quartermaster Corps to supply the needs of the Army in France. Considering the income it was then receiving from its contracts with the United States, plaintiff could not bear the expense of renting and equipping a new factory unless the United States should guarantee it sufficient contracts at a margin over cost of manufacture, completely to amortize the rental of said factory and the cost of machinery and equipment and the installation thereof, so as to insure a going factory.

Plaintiff communicated to Benedict J. Holden, Depot Quartermaster at Philadelphia, the fact of the opportunity to lease this factory site and by so doing and by installing and equipping its factory there to comply with the Government requirements and orders. Whereupon said Benedict J. Holden, Depot Quartermaster, [fol. 5] acting for and by authority of the Secretary of War, on or about July 15, 1918, directed plaintiff to lease this factory space and to install the necessary machinery and equipment to provide a going factory there and agreed further that the United States, through the Secretary of War, and the contracting officer, the Depot

Quartermaster, would award sufficient contracts to plaintiff which, at a fair margin over cost, would enable it to amortize the cost of said lease, machinery, and equipment, and agreed further that the United States would save the plaintiff from all or any loss which might result from the leasing of this factory space and the purchase of machinery and equipment and its installation therein, in the event sufficient contracts were not awarded to amortize the said factory.

V

Relying on said promise and agreement, and in compliance therewith, plaintiff did lease said factory and equipped the same for the work on the Government contracts at a cost of eighty-six thousand, one hundred twenty-eight dollars and fifty three cents ($86,128.53). Government officers did proceed to award plaintiff additional contracts as agreed upon up to November 11, 1918, when the armistice between Germany and the Allied Nations was signed. Thereupon [fol. 6] plaintiff's contracts were cancelled and no further contracts were awarded plaintiff, notwithstanding the agreement hereinbefore referred to and the fact that such contracts could have been awarded to plaintiff.

VI

Said factory was only adapted for the special Government work and could be used by the plaintiff for no other purpose; and after the discontinuance of said contracts by the Government it was necessary for plaintiff to dispose of said lease and equipment at the most favorable terms it could. Plaintiff endeavored in every way to mitigate the loss and disposed of said lease and equipment at the best price it could obtain for the same. Nevertheless, the loss in subletting said space and disposing of said equipment amounted to the sum of forty-four thousand, six hundred eighty-six dollars and twenty-eight cents ($44,686.28), after allowing the United States credit for all debts and set-offs. For this amount plaintiff prays judgment. A statement of costs to plaintiff, credits to the United States and the loss sustained by plaintiff is hereto attached marked "Exhibit A" and made part hereof.

VII

On the 10th day of June, 1919, plaintiff by mailing its statement of claim by registered mail, filed its claim for the above amount with [fol. 7] the Secretary of War, pursuant to the terms of the Act of March 2, 1919, which enabled the Secretary of War to adjust, pay, or discharge any agreement, express or implied, entered into during the emergency by an officer or agent of the United States acting under the authority of the Secretary of War, for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services or for facilities, or other purposes connected with the prosecution of the war, allowing reasonable remuneration

for expenditures and obligations or liabilities incurred in performing or preparing to perform the contract or order, where the agreement was performed in whole or in part and where the agreement was not executed in the manner prescribed by law. The War Department Claims Board, established pursuant to said Act, found that plaintiff was entitled to relief under said Act, but on appeal to the Secretary of War, relief was denied plaintiff.

VIII

Plaintiff brings this action under Section II of said Act of March 2, 1919, commonly known as the "Dent Act;" or, in event this court should determine that it has no jurisdiction under said Act, then under the general jurisdiction conferred on this honorable court by law.

[fol. 8] IX

No other action has been had on said claim in Congress or by any of the departments; no person other than plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or any part thereof or interest therein, has been made; plaintiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the plaintiff has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States.

[fol. 9] Wherefore, plaintiff asks judgment against the United States in the sum of forty-four thousand, six hundred eighty-six dollars and twenty-eight cents ($44,686.28).

Jacob Reed's Sons, Inc., by Irving L. Wilson, President. (Corporate Seal.) Frank Davis, Jr., Attorney for Plaintiff, 222 Munsey Bldg., Washington, D. C. Wm. D. Harris, of Counsel.

Sworn to by Irving L. Wilson. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

Total outlay for machinery and equipment including sewing machines, pressing machines, cutting machines, motors, trucks, etc	$31,161.38	
Total outlay for carpenter work, electrical and gas installations, painting, etc	7,991.66	
Total obligations incurred on account of lease on 8th floor, Central Building, 44 No. 6th Street, Philadelphia	41,244.96	
Overhead, including insurance, drayage, and pay of employees during erection and dismantling of plant	3,175.47	
Carrying charges, being cost of financing the plant	2,555.06	
		$86,128.53
Credits allowed the Government—		
Salvage value of machinery, equipment and installations	$9,936.41	
Rent of premises for two months October and November 1918 (although productive opera-ing time was only five weeks)	2,137.50	
Amounts realized from subleasing	26,446.68	
Proportion of loss on machinery, etc., borne by claimant	2,921.66	
		41,442.25
Net loss for which claim is now made		$44,686.28

[fol. 11] II. GENERAL TRAVERSE—Entered May 18, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. ARGUMENT AND SUBMISSION

On December 9, 1924, this case was argued and submitted on merits by Mr. Frank Davis, for the plaintiff, and by Mr. D. C. Williamson, for the defendant.

[fol. 12] **IV. Findings of Fact, Conclusion of Law, and Opinion of the Court by Hay, J.**—Entered January 5, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

Plaintiff is and was during the period hereinafter mentioned a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business in Philadelphia in that State. Its principal business, in which it had been engaged since 1824, was the buying, manufacturing, and selling of clothing and officers' and cadets' uniforms.

II

In April, 1917, plaintiff took a trial contract for manufacturing uniforms for the United States Army. It demonstrated its ability to manufacture such uniforms to the satisfaction of the Government and was given further contracts from time to time. Until shortly prior to July 15, 1918, plaintiff in manufacturing such Army uniforms for the Government was using the fifth floor of its building at 1424-1426 Chestnut Street, Philadelphia, for the cutting work on uniforms and for other work necessary in such manufacture, three floors in a building at Broad and Spring Garden Streets in Philadelphia, one floor in a building at Eighth and Arch Streets in said city, one floor at Broad and South Streets in said city, and a factory at Hampton, N. J., all of which space was used by it exclusively in the manufacture of Government uniforms. The manufacture of such uniforms was entirely different from the regular business of plaintiff.

There was no provision in any of the said contracts with the Government relative to the size or kind of facilities in the way of factories or storerooms that would be required of plaintiff.

Prior to July 15, 1918, plaintiff had demonstrated its ability to carry out its contract for the manufacture of uniforms to the fullest satisfaction of the Government, and was regarded as one of the best contractors with which the Government was dealing.

[fol. 13]

III

Early in the summer of 1918 the situation with regard to clothing and uniforms for the soldiers of the Army of the United States was critical. It was necessary to arrange immediately to provide uniforms for 4,000,000 men by the 1st of July, 1919.

In the city of Philadelphia the situation as to the manufacture of such uniforms at that time was very unsatisfactory to the Government. The production was not up to the minimum requirements. Contracts were scattered among numerous contractors, and there was much dishonesty, waste, and inefficiency.

In April, 1918, George W. Goethals, Major General, Assistant Chief of Staff, Division of Purchase, Storage, and Traffic of the United States Army, having charge of the procurement of all standard supplies for the War Department, assigned Benedict M. Hodlen,

a civilian, as depot quartermaster at Philadelphia to increase production and to eliminate dishonest and unsatisfactory contractors.

As such depot quartermaster it was his duty and he had authority to do everything possible to expedite production of uniforms to meet the program which had been laid out for the United States Army.

Mr. Holden urged plaintiff in every way to increase its production, as the same was so satisfactory to the Government. He also ordered all contractors to install storerooms at the places where the cutting was done in order that material belonging to the Government could be kept under lock and key. He also required that the factory of the plaintiff at Eighth and Arch Streets be discontinued on account of the fire risk.

It was impossible for plaintiff to install a storeroom on the floor where the cutting was then being done by it, 1424 Chestnut Street, without decreasing its production which the Government was demanding it to increase. To discontinue its factory at Eighth and Arch Streets on account of fire risk or for any other reason would also seriously cut down its production of uniforms instead of increasing the same, as demanded by the Government. The only way it could meet the Government's demand as to increased production, providing a storeroom and discontinuing the factory at Eighth and Arch Streets would be by securing sufficient space in some other building to concentrate its manufacturing on Government work in such space. Plaintiff being desirous of complying with the demands of the Government as to increased production, as well as its orders as to the stock room and discontinuance of its factory at Eighth and Arch Streets, made every effort to find suitable space in Philadelphia for continuing its work. Plaintiff ascertained that it could lease the entire eighth floor of a building at 45-50 North Sixth Street, which would be admirable for the manufacture of uniforms, in that it would afford space for the entire manufacture, provide the storeroom which the Government required, and enable it to entirely discontinue its Eighth and Arch Streets factory, at the same time materially increasing its production of uniforms. This space could only be secured by executing a lease for three years. It was necessary also, if this space was to be utilized so as to increase the production as required by the Government, to install the necessary and proper machinery.

[fol. 14]

IV

On or about July 15, 1918, the plaintiff reported the above facts to Benedict M. Halden, depot quartermaster at Philadelphia, and stated to him that the taking over and equipment of the portion of the building at North Sixth Street would involve the expenditure of a considerable sum of money, and that it did not feel justified in going ahead without some definite assurances on the part of the depot quartermaster that it would receive a sufficient number of contracts to at least compensate it for the outlay and obligations which it would have to incur. The depot quartermaster wanted to know what it would cost to rent the portion of the building and to

equip it. The plaintiff told him that such a plant would cost from $75,000 to $100,000. The depot quartermaster urged the plaintiff to increase its capacity and stated that he was satisfied that the plaintiff would receive contracts from the United States Government sufficient to compensate it for making the investment. The plaintiff suggested that the war might end. The depot quartermaster then said, "If the war stops, we will be obliged to keep an army of occupation in Europe for some time to come, and this army of occupation will need uniforms." He further stated that contracts would be placed with the plaintiff which would fully reimburse it for its proposed expenditure.

Thereupon plaintiff executed the lease for said space and proceeded as rapidly as possible to adequately equip the same. Said factory was completed and ready for operation about the middle of September, 1918. It was inspected and approved by officers connected with the Philadelphia depot both during construction and after completion. As soon as it was completed the Government immediately awarded contracts to the plaintiff, and said factory was used in the manufacture of uniforms from its completion, about the middle of September, up until the date of the armistice, when plaintiff was ordered to stop all manufacturing. Thereafter, although plaintiff was ready, willing, and able to devote the capacity of said factory to the manufacture of uniforms for the Government, and requested that additional contracts be given to it, no further contracts were given to plaintiff.

After the armistice plaintiff endeavored to have the Government take said factory off its hands and pay for its losses. The Government failing and refusing to do so, plaintiff proceeded to dispose of the lease and of the equipment at the best price it could obtain for the same. The total cost of the factory, including the lease, was $86,128.53; the amount realized by the plaintiff from the sale of said lease and equipment was $42,372.29; the loss to the plaintiff was $43,756.24.

On or about the 10th day of June, 1919, plaintiff filed claim for $44,686.28 with the Secretary of War, pursuant to the terms of the act of March 2, 1919, commonly known as the Dent Act. The War Department Claims Board, established pursuant to said act, found that plaintiff was entitled to relief under said act, but on appeal to the Secretary of War relief was denied plaintiff. Thereafter plaintiff brought this action in this court on said claim.

[fol. 15] VI

All matters connected with the origination, making, and performance of all contracts of the plaintiff for the manufacture of uniforms were taken up with the depot quartermaster at Philadelphia, and plaintiff had no dealings with regard to any of said contracts with any other official. All such contracts were executed on behalf of the Government by the officer designated in the contract as con-

tracting officer and designated by the depot quartermaster at Philadelphia.

On or about May 8, 1918, the following letter was received by the plaintiff from the depot quartermaster's office:

War Department, Office of the Depot Quartermaster

2620 Grays Ferry Road,
Philadelphia, Pa., May 8, 1918.

Please send reply in duplicate, quoting No. 421.2—174—S. & E. D.—M. B. and date of the letter.

From: Depot Quartermaster, Philadelphia, Pa.

To: Jacob Reed's Sons, 1424 Chestnut Street, Philadelphia.

Subject: Contracts.

1. In accordance with letter received from the office of the Quartermaster General, manufacturing branch, dated May 6, you are informed that all correspondence and all matters pertaining to your contracts, or any business you may have with the Quartermaster Corps in reference to contracts, should be taken up with this office, and at no time will it be necessary for you to correspond with the Quartermaster General's office unless upon our advice.

2. The orders from Washington in this matter are explicit, and it is therefore requested that you take immediate note of same and comply accordingly.

By authority of the depot quartermaster.

(Signed) S. P. Weinberg. A. S. P. Weinberg, Captain, Q. M. R. C., Asst. to D. Q. M."

VII

Benedict M. Holden, depot quartermaster at Philadelphia, while acting as such, was an agent of the Secretary of War.

Conclusion of Law

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition must be, and the same is hereby, dismissed. Judgment will be entered against the plaintiff in behalf of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and to be by him collected according to law.

Opinion

Hay, Judge, delivered the opinion of the court.

The plaintiff relies upon the provision of the Dent Act (40 Stat. 1272.) Section 1 of that act provides as follows:

[fol. 16] "That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November 12, 1918, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation, prior to November 12, 1918, and such agreement has not been executed in the manner prescribed by law: Provided, that in no case shall any award either by the Secretary of War or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order * * *."

The plantiff claims under what it alleges was an express contract between it and Benedict M. Holden, depot quartermaster at Philadelphia, that this contract was made in July, 1918, and that said Holden was "an officer or agent acting under the authority, direction, or instruction of the Secretary of War." The terms of this contract are alleged to have been that the plaintiff on its part was to rent and equip a floor of a building in Philadelphia for the production of Army uniforms, and that the depot quartermaster would see to it that the plaintiff would receive contracts from the United States in sufficient quantity to compensate it for any loss which it might incur by reason of such rental and equipment.

The facts are that the plaintiff, upon being urged by the depot quartermaster to increase its facilities for the production of Army uniforms, advised the depot quartermaster that it could only do so by renting a floor of a building in Philadelphia; that three years was the shortest term for which it could rent the building; and that the rent and the cost of equipment would be from $75,000 to $100,000, and that the plaintiff would not incur this cost unless it could be assured that it would receive a sufficient number of contracts to compensate it for the outlay and obligations so incurred. The depot quartermaster urged the plaintiff to increase its capacity, and stated that he was satisfied that the plaintiff would receive contracts from the United States Government sufficient to compensate it for making the investment. It was suggested by the plaintiff that the war might end. The depot quartermaster answered that if it did the United States will be obliged to keep an army of occupation in Europe for some time to come, and this army would need uniforms. As a result of this conversation with the depot quartermaster the

plaintiff proceeded to rent the building and to equip it for the manufacture of uniforms for the United States Army. The building was ready for work about the middle of September, 1918, and the plaintiff was given contracts for the manufacture of uniforms. [fol. 17] Before these contracts were completed the armistice was entered into on November 11, 1918, and a few days thereafter the contracts which had been awarded to the plaintiff were cancelled. As a result the plaintiff discontinued its work in the building so rented and proceeded to dispose of the lease and of the equipment at the best price it could obtain for the same.

The total cost of the factory, including the lease, was $86,128.53; the amount realized by the plaintiff from the sale of said lease and equipment was the sum of $42,372.29; and the loss to the plaintiff upon the transaction was the sum of $43,756.24. And this sum, the plaintiff alleges, the United States must pay by reason of the promises made to it by the depot quartermaster at Philadelphia.

It does not seem to us that there has been any contract proved between the parties, either express or implied. The promise of the officer to supply the plaintiff with future contracts sufficient to compensate it for the expenditure of money for equipment and rent is not such a promise as the Dent Act contemplates. The circumstances surrounding this transaction are such as to lead to the conclusion that the plaintiff was relying on the promise made to it for obtaining future contracts in the event of the continuance of the war, or if the war did not continue then on the event of the United States maintaining an army of occupation in Europe. In either case the plaintiff proceeded upon promises made to it by one who had no authority to obligate the United States to a continuance of work for which the Government might have no use. The plaintiff, in making the expenditure, relying upon the opinion of the depot quartermaster, took the chance that the war would continue, or that if it did not, there would still be the chance of using the building which it rented and equipped. There was no duress, no order directing the plaintiff to rent and equip the building, and so far as the record discloses there was no authority lodged in the depot quartermaster which authorized him to enter into a contract with the plaintiff or anyone else to rent and equip that or any other building.

The plaintiff was bound to know and to take notice of the limited authority of the officer with whom it was dealing. Baltimore & Ohio R. R. Co. v. The United States, 57 C. Cls. 140, 150. There are no circumstances here which can be held to relieve the plaintiff from its responsibility. It is said by the Supreme Court in the case of Baltimore & Ohio R. R. Co. v. United States, 261 U. S. 592, 596: "The act was intended to remedy irregularities and informalities in the mode of entering into such agreements; not to enlarge the authority of the agents by whom they were made. To entitle the claimant to compensation under such an agreement it is essential that the officer or agent with whom it was entered into should not merely have been holding under the Secretary of War or the President but that he should have been acting within the scope of his authority." And the court goes on to say in the same opinion: "It

was not intended * * * that an agreement into which he entered, although beyond his authority, should become binding upon the Government because it was made in the form of an express agreement not executed within the legal manner or of an implied agreement merely—that is, that his authority should be enlarged by the irregularity or informality with which it was exercised."

[fol 18] It does not appear that the depot quartermaster had any authority to enter into this agreement. He had authority to expedite the production of uniforms and clothing which were being manufactured by contractors in Philadelphia. But from that could not be implied an authority to rent and equip buildings. And in this case it appears that the officer entered into no contract as to the amount of the rent and the cost of the equipment, but without knowing what the rent and costs were gave assurance to the plaintiff that future contracts would be given it to compensate it for its outlay, whatever that might be. We do not feel that we can imply that the officer had any such authority. To do so would be giving an interpretation to the Dent Act which is directly in the face of the decision of the Supreme Court of the United States above quoted.

The petition of the plaintiff must be dismissed. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 19]

V. Judgment

At a Court of Claims held in the City of Washington on the 5th day of January, A. D. 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it is hereby dismissed: And it is further ordered and adjudged that the United States have and recover of and from the plaintiff, as aforesaid, the sum of Three hundred and eighty-three dollars and thirty cents ($383.30), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

VI. Proceedings After the Entry of Judgment

On February 27, 1925, the plaintiff filed a motion for a new trial.

[fol. 20] On March 14, 1925, the defendant filed a motion for amended findings of fact.

VII. Order Overruling Motions for New Trial and for Amendment of Findings—March 16, 1925

It is ordered by the Court this 16th day of March, 1925, that the plaintiff's motion for new trial and the defendant's motion for amendment of findings be and they severally are overruled.

VIII. Petition for Appeal—Filed March 31, 1925

From the judgment rendered in the above-entitled cause on the 5th day of January, 1925, in favor of defendant, and the overruling of the motion for a new trial on the 16th day of March, 1925, the plaintiff by its attorney, on the 31st day of March, 1925, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Frank Davis, Jr., Attorney for Plaintiff. Wm. D. Harris, of Counsel.

[fol. 21] IX. Order Allowing Appeal

It is ordered by the Court this 6th day of April, 1925, that the plaintiff's application for appeal be and the same is allowed.

In Court of Claims

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J; of the judgment of the court; of the proceedings after entry of judgment; of the order of court entered March 16, 1925; of the plaintiff's application for appeal; of the order of the court allowing plaintiff's application for appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 10th day of April, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 31,031. Court of Claims. Term No. 359. Jacob Reed's Sons, Inc., appellant, vs. The United States. Filed April 14th, 1925. File No. 31,031.

IN THE

Supreme Court of the United States

No. 63.

October Term, 1926.

JACOB REED'S SONS, INC.,

Appellant,

vs.

THE UNITED STATES.

On Appeal From the Court of Claims.

BRIEF FOR APPELLANT.

FRANK DAVIS, JR.,
Attorney for Appellant.

PALMER, DAVIS & SCOTT,
Of Counsel.

THE REPORTER CO., WALTON, N. Y.
New York Office: 258 Broadway, Room 612. Phone 6373 Barclay.
1926

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AUTHORITIES:

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1926.

Jacob Reed's Sons, Inc., Appellant, vs. The United States.	No. 63.

BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the Court of Claims in this case appears in Volume 60, Court of Claims Reports, page 97; also at pages 9 to 12 of the printed record herein.

The decisions of the Board of Contract Adjustment of the War Department on the original claim are reported in Volume 3, Decisions of the War Department, page 828, and Volume 7, page 660.

These decisions, together with the decision of the original board on reconsideration, which does not appear in the original reports of the War Department, but which is set out in full on pages 69 and 70 of the original record of this case, are printed as Appendix "A" to this brief.

Jurisdiction.

The judgment of the Court of Claims was entered January 5, 1925 (R. 12). Motion for new trial and amended and supplemental findings was filed February 27, 1925 (R. 12; for copy see Appendix "B," this brief). On March 14, 1925, the defendant filed a motion for amended findings of fact (R. 12). On March 16, 1925, claimant's motion for a new trial and defendant's motion for amended findings of fact were severally overruled (R. 13). On March 31, 1925, plaintiff filed petition for appeal to this Court (R. 13). On April 6, 1925, this appeal was allowed (R. 13). This appeal was taken under authority of Sections 242 and 243 of the Judicial Code, providing for appeals to this Court from the Court of Claims; the amount in controversy exceeding $3,000. Sections 242 and 243 were in effect at the time the appeal was taken and governed the same (Section 14 of the Act of February 13, 1925; 43 Stat. at L. 939, c. 229).

Statement.

The suit in the Court of Claims was to recover from the Government the actual loss to plaintiff in renting space and equipping a factory for the manufacture of uniforms under a contract made with the Depot Quartermaster at Philadelphia on or about July 15, 1918 (Petition, R. 1-5). The findings of fact (R. 5-9) may be summarized as follows:

When the war was at its height and it was absolutely necessary to have an enormous number of uniforms to supply our army in France, the situation

at Philadelphia, one of the centers of clothing manufacture, was unsatisfactory; there was dishonesty, waste and inefficiency among Government contractors and production was below requirements. General Goethals, having charge of the procurement of uniforms for the army, sent Benedict M. Holden, a civilian (and, it may be added, a capable and reputable lawyer of Hartford, Connecticut) to Philadelphia to increase production of uniforms and eliminate dishonesty. Plaintiff at that time was manufacturing uniforms for the Government and was regarded as one of the best contractors with which the Government was dealing (Finding II, R. 6). Mr. Holden found the work of plaintiff so satisfactory that he insisted that it increase its production. Plaintiff could only do this (as well as comply with other Government requirements) by obtaining a larger factory. It found that it could lease the necessary space and install the necessary machinery to meet the Government requirements at a cost of from $75,000 to $100,000. The president of the company reported this to the Depot Quartermaster, stating that plaintiff was willing to meet his requirements, but, though profits were immaterial, it could not assume any risk of loss, as the factory could only be used for Government work. The Depot Quartermaster urged, insisted, that plaintiff lease the space and install the equipment, stating that it would be given contracts sufficient to amortize the cost. Plaintiff thereupon made the lease and equipped the factory. This factory was utilized by the Government; that is, contracts were awarded plaintiff to be manufactured in said factory till the Armistice, after which time no further contracts were given though requested. Plaintiff was

compelled to dispose of the lease and equipment at the best terms it could. The total cost was $86,128.53; plaintiff realized on disposal $42,372.29, making its loss $43,756.24.

For this loss it duly filed claim under the Dent Act with the War Department Claims Board (Finding VII, R. 3). Its claim was finally denied there (see Appendix "A" of this brief). Thereupon this suit was filed in the Court of Claims under Section II of the Dent Act (Act March 2, 1919, c. 941; 40 Stat. at L. 1272).

The Court of Claims, as appears from the record and opinion, decided against plaintiff, basing its decision on the case of *Baltimore & Ohio Railroad Co. vs. The United States,* 261 U. S. 593.

Motion for a new trial and amended and supplemental findings was duly filed and overruled without argument (for copy see Appendix "B").

The Question.

The opinion of the Court of Claims is that there was no such agreement made out as would warrant relief under the Dent Act, and that the Depot Quartermaster was without authority to make the contract which plaintiff claims was made. Therefore, the questions for this Court are:

(1) Was there an agreement made which would entitle plaintiff to relief under the Dent Act?

(2) If such an agreement was made, was the Depot Quartermaster acting within the scope of his authority in making it?

The Dent Act (Act March 2, 1919, c. 94; 40 Stat. at L. 1272, Sec. 1) provides:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the president, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: Provided, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: Provided further, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen: * * *"

Argument.

I.

Was there an agreement made which would entitle plaintiff to relief under the Dent Act?

The facts with reference to the making of the contract appear in Finding IV of the Court of Claims (R. 7-8), which must be taken in connection with the previous findings showing the urgent need on the part of the Government to increase the production of uniforms and the urgent request by the Depot Quartermaster that plaintiff increase its production. The proposition came from the Government, not from the plaintiff.

The last part of the first paragraph of Finding IV is unsatisfactory and requires explanation, as it is based on a part of one answer of Mr. Wilson, the president of the plaintiff company, and quotes only a part of this answer. This quotation is misleading, unless the full answer of the witness on this point is considered.

When at the request of the Government plaintiff had found what it would cost to rent and equip the kind of factory the Government wanted, Mr. Wilson, president of the plaintiff company, reported the facts fully to Mr. Holden, the Depot Quartermaster (Original Record, Q72, pp. 40-41; see Motion for New Trial, Appendix "B," pp. 36, 38, 44). The testimony of Mr. Wilson, from which the quotation in the last part of the first paragraph of Finding IV is taken, is as follows:

"'But,' I said, 'Mr. Holden, we can't under-

take an enterprise of that magnitude'—referring to the eighth floor—'unless we can have very definite assurances from you that you will undertake to see that we are awarded contracts sufficient in size to at least amortize this new plant.' He asked me if I could give him an idea of what the plant would cost to install. I could only give him approximate figures, but I think I told him such a plant would cost between $75,000 and $100,000. Without any hesitation at all and in the most emphatic way, he said to me: 'By all means take the eighth floor and I will see that you are adequately supplied with contracts to cover your expenditures and obligations there.' I said, 'Mr. Holden, suppose the war stops.' He said, 'If the war stops, we will be obliged to keep an army of occupation in Europe for some time to come and this army of occupation will need uniforms.' He said, 'You need not have the slightest hesitation on the score of your outlay and obligations. We will take care of that fully and you will be fully reimbursed for all that you spend and more too'" (Original Record, p. 41, Q72).

There is no dispute as to this testimony. It was not only uncontradicted, but was substantiated in every particular by the testimony of Mr. Holden, the Depot Quartermaster (see extracts from the record quoted in our motion for a new trial, Appendix "B," pp. 35-45 incl.).

The finding as it stands is not as clear as it should be, and as only a part of an answer is quoted, the whole answer must be considered in connection with this finding.

It is clear, therefore, that there was a contract—an express contract; namely, that the plaintiff, at the request and insistence of the Depot Quartermaster,

and upon his promise that contracts would be placed with plaintiff which would fully reimburse it for the expenditure, rented and equipped a factory in which to perform Government contracts. It further appears that while the factory was being constructed and after its completion it was inspected and approved by Government officers, and that from the moment it was completed it was used by the Government for the manufacture of uniforms up until the date of the Armistice (Finding IV, R. 9).

It is also apparent the contract was for the benefit of the Government; even more, it was a contract that was essential to be made at the time it was made; that it was fully performed on the part of plaintiff and that the Government obtained the benefit of it so long as it was needed. It is also clear that the contract was made in the utmost good faith.

The contract comes clearly under the Dent Act and fulfils the requirements specified in the case of *Baltimore & Ohio Railroad Company vs. The United States*, 261 U. S. 593. Not only an agreement implied in fact would exist under the circumstances, but there was an express agreement and understanding; a complete meeting of the minds between the officers of the plaintiff and the Depot Quartermaster.

The expenditure was made upon the faith of this express understanding. The expenditure was not made spontaneously, but in pursuance of an express request and insistence on the part of the Government. Payment was not only expected but was promised. It was clearly understood by the defendant that plaintiff expected reimbursement for its expenditure; that it was unwilling to assume any risk of loss.

No unusual expenses were incurred, but what was done was under the supervision of the Government at all times. After the expenditure was made and the contract completed, the Government received the full benefit of the same. The facts surrounding the transaction negative anything other than a promise of recompense. The fact that under the agreement as made compensation was to be made in future by contracts to be awarded to the plaintiff is immaterial. This method of payment was highly advantageous to the Government. The Government fixed the price for the manufacture of uniforms, furnishing the material, and while no finding is made by the Court of Claims as to this, it is established by the record that the entire cost of the lease and the equipment could have been amortized in less than a year.

There is nothing in the record to show why further contracts were not given. No presumption can arise that no uniforms were needed after the signing of the Armistice, for it is a matter of common knowledge that we had a large army for a long time after the Armistice, and still have an army, and that uniforms were constantly needed. While there is no finding on this subject, there is evidence in the record that the Government continued making contracts for the manufacture of uniforms after the Armistice; this is really a matter of common knowledge. Even if the need for uniforms had automatically ended at the signing of the Armistice, still that would not have deprived plaintiff of the right to be reimbursed for its loss under its contract. The fact that one agrees to make payment in kind or by service does not relieve him from the obligation to make payment in money, if he fails in his performance as promised.

The finding as to the making of the contract is not as full and clear as it should be, and our motion for amended findings as to this should have been granted. Certainly if any part of the answer of the witness on this important matter is quoted the full quotation should be given. Especially is this true when no effort was made whatever to contradict the testimony of Mr. Wilson, which testimony was confirmed and made even stronger by the testimony of the Depot Quartermaster.

Under the express wording of the Dent Act, the cost of preparing to perform a contract or contracts is properly allowable, and such recoveries were not only allowed by the War Department Claims Board, but by the courts (see *Price Fire & Waterproofing Company vs. The United States,* 56 Ct. Cls. 502, affirmed in 261 U. S. 179).

II.

Was the depot quartermaster acting within the scope of his authority in making the contract?

It appears from the findings (Finding VII, R. 9) that the Depot Quartermaster at Philadelphia, when he made this contract, was an agent of the Secretary of War, and (Finding III, R. 6-7) that

> "George W. Goethals, Major General, Assistant Chief of Staff, Division of Purchase, Storage and Traffic of the United States Army, having charge of the procurement of all standard supplies for the War Department, assigned Benedict M. Holden, a civilian, as Depot Quartermaster at

> Philadelphia *to increase production* and to eliminate dishonest and unsatisfactory contractors."

Further, that

> "as such Depot Quartermaster it was his duty and he had authority to *do everything possible to expedite production of uniforms to meet the program which had* been laid out for the United States Army" (Finding III, R. 7).

It further appears from Finding III (R. 6) that at the time this contract was made the situation with regard to clothing and uniforms for the soldiers of the army was critical; that it was necessary to arrange immediately to provide uniforms for 4,000,000 men by the 1st of July, 1919; that the production in Philadelphia was not satisfactory to the Government; that it was not up to the minimum requirements.

If it was the duty of the Depot Quartermaster and he had authority to do everything possible to expedite the production of uniforms to meet the existing emergency, it was certainly within the scope of his authority and duty to arrange with a reputable manufacturer to provide the space and equipment where the satisfactory manufacture of uniforms could be expedited and increased. It was logically the first step for him to take.

While it does not appear in the findings, the testimony is uncontradicted in the record that Mr. Holden reported his agreement with the plaintiff to his superior officers in Washington, and there was never any criticism of the same. On the contrary, and this does appear in the record, the factory was inspected by Government officials while being installed and after completion, and was used by the Government as long as there was any need for it (Finding IV, R. 8); certainly a ratification of what the Depot Quartermaster had done.

While no finding is made by the Court of Claims as to this, General Goethals testified positively (Original Record, pp. 173-174, Qs. 18, *et seq.*) that the Depot Quartermaster had acted in this matter just as he should have acted in the emergency, and that if he had declined to make the arrangement which he made with plaintiff and it had come to the knowledge of General Goethals, the Depot Quartermaster would have been reprimanded.

It appears from the findings of fact as made by the Court of Claims that prior to the making of this contract plaintiff received the following order from the Government:

"WAR DEPARTMENT,

OFFICE OF THE DEPOT QUARTERMASTER.

2620 Grays Ferry Road,
Philadelphia, Pa., May 8, 1918.

Please send reply in duplicate, quoting No. 421.2-174-S. & E. D-M. B. and date of the letter.

From: Depot Quartermaster, Philadelphia, Pa.

To: Jacob Reed's Sons, 1424 Chestnut Street, Philadelphia.

Subject: Contracts.

1. In accordance with letter received from the office of the Quartermaster General, manufacturing branch, dated May 6, you are informed that all correspondence and all matters pertaining to your contracts, or any business you may have with the Quartermaster Corps in reference to contracts, should be taken up with this office, and at no time will it be necessary for you to correspond with the Quartermaster General's office unless upon our advice.

2. The orders from Washington in this matter

are explicit, and it is therefore requested that you take immediate note of same and comply accordingly.

By authority of the Depot Quartermaster,
(Signed) S. P. WEINBERG,
Captain, Q. M. R. C.
A. S. P. WEINBERG,
Asst. to D. Q. M."

(R., Finding VI, p. 9.)

As a matter of fact, there can be no question but that the Depot Quartermaster was acting within the scope of his authority in making this contract; that it was essentially a contract which he should have made; that it was in every way for the interest of the Government and was a necessary step in trying to meet a situation which was critical. It was not a contract made by an officer in one branch of the military service as to matters relating to an entirely different branch of the service, or a contract that was primarily within the control of superior officers. It was a contract which essentially should be made by a Depot Quartermaster who was charged with increasing and expediting the production of uniforms, and was made for that purpose alone. Of course, his action could have been overruled by superior officers; so can the action of any officer inferior to the president, but his action was not overruled; on the contrary, the contract was carried out on the part of plaintiff and on the part of the Government so long as it chose to do so.

There is no finding by the Court of Claims that the Depot Quartermaster lacked authority to make the contract, nor could such finding be made, because there is no evidence to justify it. On the contrary, the facts as found clearly show authority; namely, that the Depot Quartermaster did just what he was sent to Philadelphia to do.

If express authority on the part of every officer making a contract was necessary during the war, the army would never have been supplied with clothing, food, munitions or transportation. If such express authority were a prerequisite to recovery, not only would practically all of the allowances made by the War Department Boards be improper, but there would be no basis for the judgment of the Court of Claims and of this Court in the case of *Swift & Company vs. The United States*, 59 Ct. Cls. 364, affirmed by this Court March 1, 1926; United States Supreme Court Advance Opinions, March 15, 1926, page 338.

The Opinion of the Court Below.

The opinion of the Court of Claims (R. 9-12), we submit, is not responsive to the facts as found by the Court, and statements contained in the opinion cannot take the place of the facts as found (*Stone vs. United States*, 164 U. S. 380).

The renting and equipping of the factory was not the result of a casual conversation, but was the result of prolonged investigation and a definite request and promise. The promise was that the Government would make sufficient use of the factory to amortize the cost thereof; that plaintiff would be reimbursed for any loss. The fact that reimbursement for the cost was to be made by contracts is immaterial; that was for the benefit of the Government, and the fact that it did not see fit to so meet its obligation does not relieve it from its obligation.

The plaintiff, so far as it was able, expressly guarded itself from taking any chance on the continuation of the war. This contingency was brought up and it was

assured that if the war ended it would in any event be protected from its loss on account of renting and equipping the factory at the request of the Government.

There is no finding of fact that the Depot Quartermaster attempted to bind the United States to a continuance of work for which it might not have any use. Such a finding would be immaterial in any event, because if the contract was authorized at the time it was made, then the fact that the reason which made the contract desirable for the Government at that time might cease would not relieve it from its obligation, unless there was an express stipulation to that effect. At the end of the war, this Government, as well as every other Government engaged in war, had an immense amount of supplies and munitions for which there was no need.

The contract in this case was to supply a facility which was badly needed at the time; namely, a factory for manufacturing uniforms, and the cost of installing it was to be paid at the option of the Government in a certain way. It was a contract wholly to the advantage of the Government. The Government had the power at that time to erect such a factory itself, to take over an existing factory, to do anything, in fact, that was necessary to meet the existing need, and it is hard to imagine a contract that could be more advantageous to the Government.

The statement in the opinion that so far as the record discloses there was no authority in the Depot Quartermaster, or any one else, to rent and equip a building is not a finding of fact, and there is nothing like it in the findings of fact. We submit that the findings of fact show that there was such authority; that it was one of the very things which the Depot Quartermaster had authority to do, and certainly it is apparent that under

the wartime legislation ample authority existed in the officers of the United States to rent and equip any building; in fact, to erect and equip any building, or to take over any building with its equipment. The power was unlimited. This power vested in the President and the necessary portion of it to secure essential results came from the President straight down through direct channels to the appropriate Depot Quartermaster in the field. The Depot Quartermaster was the agent, not only of the Secretary of War, but of the President, in the matter of increasing and expediting the production of uniforms. There is nothing in the record to show that there was any limitation on the authority of the Depot Quartermaster with reference to this contract of which plaintiff or any one else could take notice. On the contrary, the express order of the Government to the plaintiff was to take up any matter pertaining to this contract, or any business it might have with the Quartermaster Corps, with the Depot Quartermaster at Philadelphia, and that it would at no time be necessary for the plaintiff to correspond with the Quartermaster General's office, unless directed by it to do so (Finding VI, R. 9).

Not only this, but plaintiff knew as well as the other contractors knew that the Depot Quartermaster was sent to Philadelphia for the express purpose of supervising and increasing and expediting the production of uniforms. As between individuals, no argument that plaintiff was not fully justified in relying upon the authority of the Depot Quartermaster would be heard, nor can we see how any such argument can be made in this case.

There is no question in this case as to enlarging the authority of the Depot Quartermaster. It is insisted that when a man is sent with instructions to do a certain

thing and he proceeds to do that thing that he is acting within the scope of his authority, and that this is definitely established when what he has done is ratified by the principal taking the benefit of the agent's action.

The statement in the opinion that the Depot Quartermaster entered into the contract without knowing what the rents and costs would be is contrary to the finding of fact (Finding IV, R. 8). He was told that the plant would cost from $75,000 to $100,000. The plant was under the supervision and inspection of the Government while it was being erected, and the cost finally was a little over $86,000. Certainly this was definite enough. Absolute certainty as to cost in matters of this kind is not necessary in any event. The amount was to be the actual cost, whatever that might be, which, of course, could be ascertained with certainty when installation was complete.

Conclusion.

It is respectfully submitted that the Court of Claims, in its opinion and judgment, has misconceived the effect of the opinion and judgment in the case of *Baltimore & Ohio Railroad Company vs. The United States*, 261 U. S. 593; that that case establishes the right of plaintiff to recover under the Dent Act; and that the judgment of the Court of Claims should be reversed.

Respectfully submitted,

FRANK DAVIS, JR.,
Attorney for Appellant.

PALMER, DAVIS & SCOTT,
Of Counsel.

APPENDIX "A."

[Copy.]

BEFORE THE BOARD OF CONTRACT ADJUSTMENT OF THE WAR DEPARTMENT.

FEBRUARY 17, 1920.

In the matter of the claim of JACOB REED SONS, Philadelphia, Pa.

Re: Facilities for the manufacture of woolen clothing. Case No. 150-C-569.

FINDING OF FACT.

The board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage & Traffic Division Supply Circular #17 for $35,242.92 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant, Jacob Reed Sons, of Philadelphia, Pa., makes claim under the act of March 2, 1919, for reimbursement for expenditures made and obligations incurred for the lease of a building and for machinery and equipment installed therein, alleging that it was induced to make the expenditures and incur the obligations at the request of Mr. Benedict M. Holden, depot quartermaster at Philadelphia, Pa.

3. It appears that in the summer of 1918 the garment manufacturers of the Philadelphia district working on

Government contracts were not able to keep production up to the demands of the Government. Some contractors were not giving satisfaction as to either quantity or quality of work turned out. They were considered undesirable by the officers of the Philadelphia depot. Claimant had been prior to and was on July 15, 1918, working on Government contracts for wool garments and was giving entire satisfaction as to quality of work, but its production was limited because of lack of floor space. The depot quartermaster was anxious that claimant increase its production, it being his intention to discontinue giving orders to the undesirable manufacturers as fast as the desirable manufacturers were able to increase their production.

4. Prior to July 15, 1918, the Philadelphia depot quartermaster had issued instructions to Captain John F. Clayton, Q. M. C., chief of the inspection branch, C. & E. Division, of the Philadelphia district, that all manufacturers working on Government contracts should provide a suitable stock room adjacent to the cutting room, and that all Government-owned goods should be kept therein under lock and key. Claimant's cutting room at 1424 Chestnut Street was inadequate to claimant's demands, and to have converted a part of the cutting room into a stock room would have materially reduced claimant's production. There was no other room available for a stock room. Another reason why the officers of the Philadelphia depot desired that claimant secure another location for its plant was that the sanitary conditions of the plant at Eighth and Arch Streets were unsatisfactory and the building was considered a fire trap.

5. For the reasons above stated claimant's president,

Mr. Irving L. Wilson, had been repeatedly urged and requested, both by the depot quartermaster and by Captain William Brooks, officer in charge of the manufacturing branch, C. & E. Division, of the Philadelphia district, to secure larger and more suitable quarters and equip the same for the purpose of filling Government orders and to close its plant at 1424 Chestnut Street.

6. On July 15, 1918, claimant's president informed the depot quartermaster that he then had an opportunity to lease the eighth floor of the building at 44-50 North Sixth Street, but that it would be necessary to sign a lease for three years. Mr. Wilson further stated to the depot quartermaster that he was not desirous of undertaking a proposition that would require his company to assume obligations as large as this would necessitate without definite assurance of a volume of Government orders sufficient to keep the plant busy until the cost of the new plant had been absorbed out of the profits. The depot quartermaster replied that claimant would be given Government orders to keep the plant busy for at least the entire period of the lease and even longer, perhaps five years, and requested Mr. Wilson to negotiate the lease and install the machinery and equipment.

7. Acting upon these definite assurances, claimant, on July 23, 1918, leased the floor above referred to, and as soon thereafter as possible installed new equipment and machinery, built the stock room and closed its plant at 1424 Chestnut Street. The new plant was in operation by the middle of September, 1918, and it was kept busy on Government orders as long as the requirements of the Government continued, which was until shortly after the armistice. When the requirements of the Government ceased claimant had no further need for this plant, so

the machinery and equipment was disposed of and the premises were sublet for the remainder of the term.

DECISION.

1. An agreement was entered into on or about July 15, 1918, under which claimant was to lease a plant and install machinery and equipment for the manufacture of wool garments for the Government, and claimant was to be given Government orders sufficient to keep it busy until the cost of the plant had been absorbed by the profits earned.

2. Claimant made expenditures and incurred obligations upon the faith of this agreement prior to November 12, 1918, but did not receive orders sufficient to amortize the cost thereof.

3. Claimant is entitled to be reimbursed the loss it has sustained by reason of the failure of the Government to perform its part of the agreement above stated.

DISPOSITION.

1. This board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate "C" to the Claims Board, Director of Purchase, for action in the manner provided in Subdivision "C," Section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

BOARD OF CONTRACT ADJUSTMENT,
(Signed) By REGINALD S. HUIDEKOPER,
Member.

We concur:

(Signed) FRANK E. TAYLOR,
Major, Judge Advocate, Associate Member.
(Signed) JOHN ROSS DELAFIELD,
Colonel, Ordnance Department, Chairman.

[Seal]: Board of Contract Adjustment, War Department.

A true copy.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the Board of Contract Adjustment, at Washington, this 17th day of February, 1920.

(Signed) WILLARD A. DOERR,
Major, F. A., Recorder.

Attest:

(Signed) FLOYD G. WHITNEY,
Captain, Ordnance Department.

Claim No. 150—C—569.

FORM C.

CERTIFICATE OF THE BOARD OF CONTRACT ADJUSTMENT.

We, the Board of Contract Adjustment, having made due and proper investigation, find that an agreement was entered into in good faith between Jacob Reed Sons, Philadelphia, Pa., and Benedict M. Holden, depot quartermaster, Philadelphia, Pa., an officer or agent acting under the authority, direction, or instruction of the

Secretary of War (the President of the United States), on or about the 15th day of July, 1918, during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war; that the agreement had been performed in whole or in part, or expenditures had been made or obligations incurred by the claimant on the faith of such agreement, prior to November 12, 1918; that the agreement has not been executed in the manner prescribed by law, and is within the provisions of Section 1 of the Act of Congress approved March 2, 1919, entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," and that the documents attached hereto constitute a detailed statement showing the nature, terms, and conditions of said agreement; and we hereby recommend that the Secretary of War proceed to adjust, pay, or discharge the said agreement.

BOARD OF CONTRACT ADJUSTMENT,
By (Signed) JOHN ROSS DELAFIELD,
Chairman, Colonel, Ord. Dept., U. S. A.

[Seal]: Board of Contract
Adjustment, War Department.

Dated February 17, 1920.

Attest:

(Signed) WILLARD A. DOERR,
Major, F. A., Recorder.

Accepted and approved:

(Signed) JACOB REED'S SONS,
Claimant.
IRVING L. WILSON,
Pres.

Dated——

BEFORE THE BOARD OF CONTRACT ADJUSTMENT OF THE WAR DEPARTMENT.

In the matter of the claim of Jacob Reed Sons, Philadelphia, Pa.

Document setting forth the nature, terms, and conditions of the agreement for facilities for the manufacture of woolen garments.

Case No. 150—C—569.

1. On or about July 15, 1918, Mr. Benedict Holden, depot quartermaster, Philadelphia, Pa., instructed the claimant to take a three years' lease of the eighth floor of the building at 44-50 North Sixth Street, Philadelphia, Pa., and install facilities and equipment therein so that it might have increased facilities to manufacture woolen garments for the Government and space for a storeroom for the Government-owned cloth which claimant was using in the performance of its Government contracts at its cutting plant at 1424 Chestnut Street, Philadelphia, Pa., where the space was insufficient.

2. Mr. Holden promised the claimant that the Government would give the claimant sufficient contracts for the manufacture of woolen garments so as to enable it to amortize the expenses and obligations it incurred in leasing the eighth floor of the building at 44-50 North Sixth Street and in purchasing and installing the facilities and equipment to be placed therein at the request of the Government.

3. Acting on the instructions and directions of the representative of the Government and prior to November 12, 1918, the claimant did lease the eighth floor of the building at 44-50 North Sixth Street, Philadelphia, Pa., for a period of three years, and did install therein machinery

and equipment for the manufacture of woolen garments for the Government, and did construct a storeroom for the safe-keeping of Government-owned cloth, and did devote the entire capacity of this plant to the filling of Government orders as long as required by the Government, but has not received contracts from the Government sufficient to enable it to amortize the expenses and obligations it has incurred in so doing.

4. There arises an obligation on the part of the Government to reimburse the claimant for the losses it has sustained by reason of complying with the instructions and directions of the agent of the Government.

Approved and certified this 17th day of February, 1920.

BOARD OF CONTRACT ADJUSTMENT,
By (Signed) REGINALD S. HUIDEKOPER,
Member.
(Signed) WILLARD A. DOERR,
Major, F. A., Recorder.

WAR DEPARTMENT CLAIMS BOARD,

MUNITIONS BLDG.,

Washington, April 7, 1920.

Memorandum for: Board of Contract Adjustment.
Subject: Case of Jacob Reed Sons, Philadelphia, Pa., Case 150-C-569 PC-5007.

1. I am returning herewith the opinion of your board in the above case of February 17, 1920, and Certificate Form C, issued by your board of the same date.

2. The certificate recites that it is based upon an oral promise of the zone supply officer, Philadelphia, Pa., that the Government would give the claimant sufficient contracts for the manufacture of woolen garments so as to enable it to amortize the expenses and obligations it incurred in leasing certain premises and purchasing facilities and equipment.

3. The claimant in its petitions alleges that the agreement on the part of the Government was:

"In consideration of providing and furnishing the facilities, plant, and equipment, etc., by claimant, the Government agreed that when such facilities were installed and the new plant operative the Quartermaster's Department, U. S. Army, would award claimant contracts adequate in size, amount, and continuity to compensate for the expenditures made and the obligations incurred, in providing such facilities."

4. The evidence deduced before the Board of Contract Adjustment upon which this allegation is said to be proved is substantially as follows:

"Mr. Wilson (representing the claimant). Mr. Holden, we have a chance to lease the entire 8th floor of the new Central Building, at 40-50 North 6th Street. Would you advise us to take it?

"Mr. Holden (the zone supply officer). By all means take it.

"Mr. Wilson. If we do so, can we depend upon getting enough work to keep us going and repay us for the large outlay and investment necessary to lease and equip such a plant?

"Mr. Holden. As long as your work comes up to its present standard you can depend on getting all the work you can turn out.

"Mr. Wilson. But, Mr. Holden, we will have to take a lease for three years on the floor.

"Mr. Holden. Don't worry about that; you will have all you can do for five years."

5. It would appear that the remarks of the zone supply officer were so lacking in definiteness that it is extremely doubtful whether it could be held that a binding contractual relation was entered into by and between the parties. It appears also from your decision that the zone supply officer assured the claimant that the Government would furnish orders to keep the plant busy for at least the entire period of the lease, and even longer—perhaps five years (page 3 of the opinion). Section 3732 R. D., as amended by the Act of June 12, 1906 (34 Stat. 255), provides:

"Unauthorized contracts prohibited. No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Department, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year. Sec. 3732, R. S., as amended by Act of June 12, 1906 (34 Stat. 255)."

It would seem that the zone supply officer had no power to purchase on behalf of the United States clothing to exceed the necessities of the year ending June 30, 1919. It is not apparent that the zone supply officer had power to enter into the alleged arrangement for any period.

6. It is requested that further consideration be given to this case in the light of the above views.

J. L. SCHLEY,
Colonel, Engineers, U. S. A.
Member of the War Department Claims Board.

Incl.: Cert. Form C. Opinion 2-17-20.

WAR DEPARTMENT,

BOARD OF CONTRACT ADJUSTMENT,

Twentieth and C Streets NW.

Washington, April 22, 1920.

In reply refer to Claim No. 150-C-569.

MEMORANDUM PURSUANT TO WAR DEPARTMENT CLAIMS BOARD RESOLUTION OF APRIL 6, 1920.

Subject: Claim No. 150-C-569, Jacob Reed's Sons (Inc.).

In accordance with request of the special member, War Department Claims Board for Purchase, we have given careful consideration to his suggestions offered and have reconsidered the whole matter, including the testimony, evidence, and documents, and find no ground for modification of our decision heretofore rendered for the following reasons:

(a) The assumption that the Government has entered into a contract for a period of three years is not borne out by the facts shown of record. While it is true that the claimant leased a space for a new plant for three years, for which it now seeks reimbursement, the Government was not a party to that contract. The only contract or agreement to which the Government was a party is the agreement to reimburse the claimant for the expenses it has been put to in leasing the new plant and installing machinery therein. If the Government gave the claimant sufficient contracts by which it could recoup these expenses in six months, nine months, or a year

the Government would have fulfilled its obligation to the claimant. I can see no difference between agreeing to reimburse a contractor through contracts for facilities he may acquire or for building or leasing a plant. The life of the facilities or the plant or the duration of the lease is not a part of the contract to which the Government is a party.

(b) The agreement shown in this case is sufficiently definite to bring it within the Act of March 2, 1919, so as to entitle the claimant to relief. The claimant was a well established garment manufacturer, whose output during the war had been perfectly satisfactory to the Government. It maintained its cutting rooms at a plant on Chestnut Street, Philadelphia, and it had four other finishing factories which depended on the cutting-room plant for the cut materials. The Government issued orders that all clothing manufacturers would have to build storage rooms for Government-owned material in their plants, so that material could be kept under lock and key by the Government agents. The testimony is conclusive that the claimant could not have complied with this requirement, because there was no space in its Chestnut Street plant where a storeroom could be erected without substantially decreasing production. The Government agents informed claimant that unless it built a storeroom the Government would issue no more material to claimant with which to perform its existing contracts, thereby compelling it to obtain larger quarters.

The Government inspectors notified claimant that its Arch Street finishing plant was a fire trap, and the claimant would have to move out of there because of the conditions of that plant.

Added to these two pertinent facts is the circumstance that the Government insisted upon the claimant's increas-

ing its production, but the claimant took the precaution to get from Mr. Benedict Holden, the zone supply officer in Philadelphia, with whom it had made previous contracts and from whom it had taken orders relative to contracts, a positive and direct assurance that the Government would give claimant enough contracts to reimburse it for the expenses of leasing a new plant and installing machinery therein. Mr. Holden had been sent to Philadelphia by General Goethals to stop dishonest practices indulged in by certain woolen-garment markers. He was then centralizing contracts in satisfactory producers, such as the claimant was, and he knew contracts would be awarded within his zone in accordance with his recommendations, and in taking the action he did Mr. Holden was encouraged by his superior officers. The claimant was not satisfied with Mr. Holden's suggestion that the claimant obtain the new plant and equip it and pinned him down to a positive assurance that he would give the plaintiff sufficient contracts to enable it to recoup for the cost of the new plant and facilities. On further insistence by the claimant that the promise be made more definite in which the claimant stated that he was not willing to assume the big expense because of the possibility of the termination of the war. Mr. Holden said that he would keep the claimant's plant busy even if the war ends, because uniforms would be required for the army of occupation, and added, "I ask you to do this, and for God's sake take it on and let us deal with some one who can give us honest goods."

It is believed that the facts disclosed by this record fully bring the case within the Act of March 2, 1919, which requires an adjustment to be made with a contractor who has, in good faith, prior to November 12, 1918, made expenditures or contracted obligations on

faith of an agreement with the agents of the Government.

We see no reason for altering the opinion of this board dated February 17, 1920.

REGINALD S. HUIDEKOPER,
Member.
ROBERT L. HENRY, Jr.,
Member.

RSH/jes.

I concur:

JOHN ROSS DELAFIELD,
Colonel, Ordnance Department,
Chairman.

BEFORE THE WAR DEPARTMENT CLAIMS BOARD, APPEAL SECTION.

September 21, 1920.

In the matter of the claim of Jacob Reed's Sons (Inc.), Philadelphia, Pa.
In re: Facilities for manufacture of wool clothing.
Case No. 150-C-569.

ON RECONSIDERATION.

1. By decision of the Board of Contract Adjustment dated February 17, 1920, claimant was granted relief.

2. At the instance of the special member, War Department Claims Board, for Claims Board, Office Director of Purchase, an appeal was perfected to the Secretary of War on behalf of the Government. The Secre-

tary of War, upon consideration of the record, under date of September 10, 1920, returned the record to this board with the following order:

"The uniform course of decision by the Board of Contract Adjustment has required that there should have been apparent authority on the part of the officer undertaking to bind the Government and a belief on the part of the claimant that such authority existed, before an informal contract could be validated. In the present case it is entirely clear that Mr. Holden did not have authority and equally clear that Mr. Wilson did not believe he had authority; but if that question be waived and full authority assumed in Mr. Holden, the fact remains that he never undertook to make any such contract as is here sought to be set up, nor did the claimant believe that any such contract was in mind.

"The claimant here created and acquired additional facilities in question in part in order to enable it to comply with proper and reasonable requirements on contracts already received from the Government, and in part in anticipation of future contracts which would enable it to amortize the expenditures made. The future contracts were to be given to meet additional war needs or post-war needs arising from the necessity for keeping large bodies of men in the Army for a long time after the cessation of hostilities. There is no claim that the claimant was to be reimbursed in any event, but only by contracts for one or the other of the purposes above stated. Neither of these needs arose, and therefore no such future contracts could be awarded. The claimant therefore suffers a loss of its anticipated reimbursement, but the Government has never promised to make it in any other contingency than as its needs justified further contracts. In other words, the loss which has occurred

is one which the Government never undertook by contract to make good.

"There is in this record every evidence of a desire on the part of officers representing the Government to stimulate the installation of better facilities both for contracts already in process of execution and to meet the future needs of the Government, but there is no evidence of any intention on the part of the Government to bear the cost of these facilities in any other way than by making use of them as its needs arose.

"An order should be entered denying relief."

3. By direction of the Secretary of War, as stated in the foregoing order, the decision rendered by the Board of Contract Adjustment February 17, 1920, is hereby set aside and vacated, and all relief asked for by claimant is denied.

Certificate C and the document setting forth the nature, terms and conditions of the agreement found by said decisions to have been established, each dated February 17, 1920, are hereby recalled, cancelled, and naught held.

DISPOSITION.

Final order denying relief will be issued.

WAR DEPARTMENT CLAIMS BOARD,
By (Signed) HUGH C. SMITH,
Member, Appeal Section.

We concur:

(Signed) GEO. A. FRAZER,
Captain, Q. M. Corps, Associate Member,
Appeal Section.
(Signed) GEO. L. MCKEEBY,
Lt. Col., Infantry, Chairman Appeal Section.

Seal:
War Department Official Claims
Board.

Approved Sep. 22, 1920:

J. A. HULL,
Member War Department Claims Board,
Colonel, J. A., Vice Chairman War Department Claims
Board.

Approved by order of the War Department Claims Board Sept. 23, 1920.

(Signed) A. L. LANSDALE,
HCS/cms. Recorder.

APPENDIX "B."

(Copy)

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

JACOB REED'S SONS, Inc., Plaintiff, vs. THE UNITED STATES, Defendant.	No. B-42

(Filed February 27, 1925.)

Plaintiff's Motion for a New Trial.

Plaintiff respectfully moves the Court for a new trial, for amendments to the findings of fact as made, for additional findings of fact, that the case may be reopened and judgment rendered for the plaintiff, all for the reasons hereinafter specified in detail.

I.

THE MOTION AS ADDRESSED TO THE FINDINGS FOR THE PURPOSE OF HAVING THE SAME AMENDED AND SUPPLEMENTED.

(a) In Finding IV (page 3 of the findings as made) it is stated (12th line from top of page):

> "The depot quartermaster urged the plaintiff to increase its capacity" * * *

There is no question as to the correctness of this finding as far as it goes, but, in view of what actually transpired, as shown by the record, we respectfully submit that it is not as explicit and strong as it should be. Mr. Wilson, president of the plaintiff company, did not want to go into this transaction and was fearful of the consequences; when he reported the situation to the depot quartermaster, as set forth in the first part of Finding IV, the depot quartermaster said (as quoted by Wilson, R., p. 41—answer to Q72):

> "Without any hesitation at all and in the most emphatic way, he said to me: 'By all means take the eighth floor.'" * * *

While the depot quartermaster in one place says (R. 22, Q72):

> "I urged Jacob Reed's Sons to increase their capacity because" * * *

This is only a part of one of his statements, and it definitely appears that what he urged was that plaintiff increase its capacity in the very definite manner specified. This is absolutely clear on the record; thus, the depot quartermaster states (R. 21, Q63):

> "* * * I urged him to lease that space that he had in mind at that time. * * * At the time he discussed leasing space so he could get his storeroom I urged him to lease space so he could get additional capacity."

R. 21, Q66:

> "* * * he discussed this taking over this space and I urged him to take it. My effort was to get the Reed's Sons to enlarge their capacity in a building or a space that would be where we could have a storeroom and en-

large their capacity rather than to correct anything which they had there."

R. 24, Q75:

"* * * My recollection is that he had to install new machinery. And I think I made the suggestion that we would loan him the influence of the War Department, of the Purchase, Storage and Traffic Division, in getting this machinery and equipment in a hurry." * * *

R. 24, Q79a:

"* * * My plan was to get Jacob Reed's Sons to enlarge their plant so I could get the benefit of their capacity. * * * My anxiety was to get him to put it in."

R. 24, Q80:

"I urged him to increase his capacity to put in this new plant." * * *

There are other answers bearing on this matter, all to the same effect. There is no evidence, direct or indirect, in the record, which contradicts in any way any of the statements of the depot quartermaster or Mr. Wilson as to this transaction; there is, in fact, no controversy about it.

We respectfully represent, therefore, that we are entitled upon this part of this finding to have the same amended by substituting the words:

"The depot quartermaster urged the plaintiff to immediately go ahead with the transaction, lease said space and install the necessary equipment"

for the words

"The depot quartermaster urged the plaintiff to increase its capacity."

Clearly what plaintiff was urged to do was to increase its capacity in the manner it had reported it could do; while the simple statement that it was urged "to increase its capacity" might mean in that particular way, it also might mean an indefinite statement as to increasing capacity. To anyone familiar with the trial record this change would appear inconsequential, but as the findings of the Court supersede the actual record, the finding as made to one not having access to the original record must necessarily appear indefinite. This amendment is in substance the same as that requested by defendants. See Defendant's Request for Findings of Fact, R., p. 217 (last sentence of 2nd request), which reads:

> "The depot quartermaster urged plaintiff's officers to immediately lease the additional space and install the necessary equipment."

(b) The remainder of Finding IV (after the word "capacity" in the 13th line) we respectfully ask the Court to amend. This is asked because the finding as it stands, while not incorrect so far as it goes, is unintentionally prejudicial to plaintiff, in that it is incomplete, omitting matters which we think are fairly proven, and because it gives part of a statement of a witness instead of the whole, the omitted portion being equally important with the portion given.

The testimony of Mr. Wilson (the witness from whose testimony the quotation is made later on in this finding) covering this part of the finding (R. 41, Q72) reads:

> " 'But,' I said, 'Mr. Holden, we can't undertake an enterprise of that magnitude,' referring to the eighth floor, 'unless we can have every definite assurance from you that you will un-

dertake to see that we are awarded contracts sufficient in size to at least amortize this new plant.' He asked me if I could give him an idea of what the plant would cost to install. I could only give him approximate figures, but I think I told him such a plant would cost between $75,000 and $100,000. Without any hesitation at all and in the most emphatic way, he said to me, 'By all means take the eighth floor and I will see that you are adequately supplied with contracts to cover your expenditures and obligations there.' I said, 'Mr. Holden, suppose the war stops.' He said, 'If the war stops, we will be obliged to keep an army of occupation in Europe for some time to come and this army of occupation will need uniforms.' He said, 'You need not have the slightest hesitation on the score of your outlay and obligations. We will take care of that fully and you will be fully reimbursed for all that you spend and more too.'"

This testimony stands uncontradicted and undisputed; the Court has quoted a portion of it in its finding. Our objection to the first part of the finding we have quoted is that the effect of it is that the depot quartermaster simply communicated to Wilson his (the depot quartermaster's) satisfaction that plaintiff would receive contracts, etc.; quite a different thing from the positive assurance which the testimony shows was given. That assurance was given, and not simply a statement by the depot quartermaster that he was satisfied, is conclusively shown, not only by the uncontradicted and undisputed testimony of Mr. Wilson, but also by the testimony of the depot quartermaster; and, further, that the statements of the depot quartermaster were made for the purpose of inducing Mr. Wilson to act upon them. We

call attention to the following answers, taken from the record of the testimony of the depot quartermaster (R. 23, Q74):

> "* * * Mr. Wilson spoke to me of the investment which it would require if he would conform to the wishes which I had expressed to him in regard to his relocating and enlarging his plant and appeared reluctant to undertake this work and make the investment unless he had some assurance that it was good business for him to do it; in substance, that he would get work enough to justify. My recollection is that he told me his bank or someone had inquired as to the possibility of continuation of contract. I felt that I had the authority, I feel now that I had the authority, and I wanted to assure Mr. Wilson that the character of their product was satisfactory, so much so that he was considered, his firm was considered, one of the best Government contractors we had, and that being so there would be no question of his receiving contracts for such quantities of material as would justify making the investment necessary to move his factory and enlarge his facilities in accordance with the plan which he said he could carry out if the business, the prospective business, was such as to justify his doing it."

R. 24, Q79a:

> "* * * My plan was to get Reed to enlarge his plant. There never was any plan that I had to use his plant to capacity. My plan was to get Jacob Reed's Sons to enlarge their plant so I could get the benefit of their capacity. I never had any question as to their having contracts enough to employ the plant to its full capacity. I felt very certain when I was talking with Mr. Wilson that the en-

larged plant would be employed to capacity. My anxiety was to get him to put it in."

R. 24-25, Q80:

"I urged him to increase his capacity to put in this new plant. I reported the contemplated change to my superiors in Washington. I had meetings in Washington at which we would make report of the production within our zones and the conditions affecting the production, not only in clothing but in everything, and I reported the contemplated increase in Jacob Reed's Sons' plant, reported it as increased production from this particular firm and a possible relief, a possible channel through which we might obtain relief from obnoxious contractors in that zone; and after talking with Mr. Wilson I talked with the gentlemen in Washington and New York; and at a subsequent meeting I stated my conclusions to him. I had received information that if the war was over in a short time, which none of us on this side of the water anticipated, that we would probably have an army of occupation, that we would unquestionably require a large quantity of equipment, particularly of uniforms and overcoats, and I repeated this information to Mr. Wilson with a view of convincing him that it was the part of wisdom to make the investment which this increased plan required."

R. 25, Q81:

"* * * I stated to Mr. Wilson that a firm which had his reputation with our depot and with the War Department would always have contracts for clothing if there were any contracts to be let at all to anyone."

R. 25, Q82:

"* * * I had the knowledge that he was

making this investment entirely for Government work and that he would not make it were it not for the fact that I, acting in the capacity of zone supply officer, had worked pretty hard to convince him that this was needed, and if he furnished it it would be used; and I do know that it was the investment of so much money that was the subject of discussion with me; and that is why I say I think Mr. Wilson spoke of something along the lines of his bank wanting to know what was the prospect of his getting contracts enough to get this money out if he put it in; and I tried to assure him that there was every prospect; and there was every prospect. There was no question in my mind at the time I talked to Mr. Wilson, at the time we had these interviews, but what this firm would receive contracts from the United States Government sufficient to compensate them for making this investment. I intended that they should receive them, and the War Department intended that they should receive them. I mean by the 'War Department' so far as it was represented by those gentlemen who came in contact with me in the performance of my duties."

R. 25, Q83:

"I am certain that Mr. Wilson would never have recommended to his firm the making of this investment had it not been for the conversations which he had with me, because he did say to me in the Union League Club when we parted and he decided he was going to do it, 'Well, if you say so, I will go ahead and do it.'" • • •

R. 32-33, RDQ136:

"• • • I did have authority to urge Mr. Wilson to increase his capacity. I had the

position and I believe I had the authority to assure him that the increased capacity would be employed. From personal conversations with Mr. Wilson I am convinced that he believed me and believed that capacity would be employed, because I cannot conceive of a man making that investment that could not be employed on anything but this Government work, and it was $75,000 to $100,000; and he did not, to be frank with you and with the Government and all parties in the claim, in which I am not interested other than to stand back of a man who stood back of me at a time when I wanted him, Wilson did not want to make this investment, and I urged him to do it and the officers of my staff urged him to do it; and he did it very reluctantly, stating to me at one time that he never expected to get any profit out of it, but if he could get back the money he put in it." * * *

Certainly the substance of this testimony is that if plaintiff supplied the facilities which the Government requested it was assured that it would be reimbursed for its outlay by the award of contracts sufficient for that purpose.

We, therefore, respectfully request that after the word "stated" in the 13th line of Finding IV (page 3 of Findings as made by the Court, or immediately after the word "equipment" if the amendment requested in the preceding paragraph hereof be made) the remainder of said line and the next following eight lines (being the remainder of the paragraph) be stricken out and that there be substituted therefor the entire conversation between Mr. Wilson and the depot quartermaster on the subject of reimbursement for the outlay, as it appears in the record, instead of only a portion thereof; that is, that there be sub-

stituted for that part of the first paragraph of Finding IV (page 2 of Findings), which reads:

> "* * * and stated that he was satisfied that plaintiff would receive contracts from the United States Government sufficient to compensate it for making the investment. The plaintiff suggested that the war might end. The depot quartermaster then said, 'If the war stops, we will be obliged to keep an army of occupation in Europe for some time to come, and this army of occupation will need uniforms.' He further stated that contracts would be placed with the plaintiff which would fully reimburse it for its proposed expenditure."

The full answer of the witness upon this subject from which this quotation is taken, as it appears in the record, page 41 (answer to Q72), is as follows:

> "* * * 'But,' I said, 'Mr. Holden, we can't undertake an enterprise of that magnitude,' referring to the eighth floor, 'unless we can have very definite assurances from you that you will undertake to see that we are awarded contracts sufficient in size to at least amortize this new plant.' He asked me if I could give him an idea of what the plant would cost to install. I could only give him approximate figures, but I think I told him such a plant would cost between $75,000 and $100,000. Without any hesitation at all and in the most emphatic way, he said to me, 'By all means take the eighth floor and I will see that you are adequately supplied with contracts to cover your expenditures and obligations there.' I said, 'Mr. Holden, suppose the war stops.' He said, 'If the war stops, we will be obliged to keep an army of occupation in Europe for some time to come and this army of occupation will need

> uniforms.' He said, 'You need not have the slightest hesitation on the score of your outlay and obligations. We will take care of that fully and you will be fully reimbursed for all that you spend and more, too.' "

We therefore respectfully request that the finding be amended as requested, as we submit we are fairly entitled to the full answer of the witness, all that was said on the subject, instead of an extract therefrom.

Additional Findings Requested.

(c) We respectfully request that additional findings, duly requested heretofore by plaintiff but not appearing in the findings as they now appear, be made by the Court as follows:

> "(1) After the Armistice contracts for uniforms were given out to other contractors."

This finding is deemed important; the fact is established by the record (Wilson, R. 55, Q177; Holden, R. 26, Qs. 89, 90, 91; Lemon, R. 183, Qs. 12, 13, 14). The evidence upon this point is sufficient to establish the fact *prima facie;* no attempt was made to contradict; it is almost a matter of common knowledge, and the fact must stand as established (Original Request, R., p. 191).

> "(2) The contemplated cost of the lease and equipping the plant, namely, $75,000 to $100,000, could have been amortized within six months or a year" (Holden, R. 32, Q134; Wilson, R. 41, Q76).

This fact is important and is established by the

evidence; there is no controversy or dispute concerning it. (The original request appears in the first paragraph of Record, page 190.)

> "(3) Mr. Wilson, president of plaintiff company, also advised the depot quartermaster that the proposed factory could only be used for the work on Government uniforms, and it could not in any way be used in connection with plaintiff's regular business."

This fact has an important bearing upon the good faith of the transaction; that plaintiff went into it at the request of the Government, and negatives any idea of an attempt to acquire a factory at Government expense. It is fully established by the record (Holden, R. 25, Q82; R. 32, Q136; Wilson, R. 44-45, Qs. 106-107. Original Request for this Finding, R. 190).

(d) We respectfully request an additional finding to the effect that the agreement between plaintiff and the depot quartermaster was entered into in good faith, was for the acquisition of facilities and equipment connected with the prosecution of the war; that the expenditure by plaintiff was made solely upon faith of this agreement (Holden, R. 32, Q136; Wilson, R. 74, Q238). These findings, with others, were originally requested by us in Request for Findings No. VIII, R. 193 and 194, and are fully established by the record as duly referred to in our said request. They are in a sense jurisdictional and we submit should be found as facts.

(e) In our original Request No. VIII (R. 193-4), the last paragraph (p. 194), we made the following request for a finding:

> "Said Benedict M. Holden was authorized to make such agreement, as it was his duty to do everything that would increase the production of uniforms for the army, and that was the direct purpose of this agreement and the result to be attained by it."

In support of this finding we cited testimony in the record by General Goethals, General Wood, Mr. Kirstein and Mr. Holden, which we submit substantiate the requested finding. The testimony of General Goethals (R. 172-3) is definitely to the effect that, on account of the magnitude of the program for clothing in 1918 and the necessity for increasing production, it was impossible to supervise the entire matter from Washington, and for that reason large discretion and duties were assigned to depot quartermasters or zone supply officers, and it was the necessary part of the duty of these officers to do everything possible to expedite the production; that depot quartermasters were officers in the Quartermaster Corps, the Corps having the duty of supplying clothing to the army, acting under the direction of the Secretary of War and President, and that the Depot Quartermaster at Philadelphia, Benedict M. Holden, was such an officer and that as such it was part of his duty to do everything he could to increase production; that it was not necessary for him to take up everything he did toward that end with his superiors. The exact answer of General Goethals to this (answer to Question 14, R. 173) is as follows:

> "Oh, no; we could not have worked that way. We had to give the man responsibility in the field or we never could have gotten anywhere. No one man sitting in Washington could have directed the details of the various steps or measures that would be necessary in order to get the results."

He further stated that he was familiar with the arrangement made by Mr. Holden with plaintiff in its case, and when asked whether in making such arrangement he was acting properly, his answer was (R. 173, answer to Question 18):

> "I think he did. He acted just as I would have expected a man in similiar conditions to act considering the condition of the clothing emergency that existed at that time."

He further stated (R. 179, answer to Questions 78 and 79) that if Mr. Holden had not acted as he did and it had come to the knowledge of General Goethals that the General would have reprimanded him, perhaps relieved him, and that he was acting in this matter along the line it was intended he should act when he was appointed.

On cross-examination, Question 83 and its answer are as follows (R. 179):

> "Re-cross question. When you say that you would have reprimanded Mr. Holden had he acted otherwise in this Jacob Reed matter in July, 1918, what do you understand Mr. Holden did or tried to do?
>
> "Answer. Mr. Holden tried to get Jacob Reed's Sons to increase their facilities so as to be able to take larger contracts and therefore increase the production of clothing by that company, and anything that would accomplish that in the summer of 1918, in view of the emergency that then existed and the shortage of clothing, was justifiable."

General Goethals further testified that the powers vested in the department of which he was the head were enormous; that it had the power to do practically everything to accomplish the results required; that it could

take a factory, build a factory, equip a factory for a manufacturer and get him to run it; that there was practically no arrangement which could not be made to bring about the results required; namely, the increased production of the manufacture of uniforms (see testimony, R. 178, Qs. 64-75).

This testimony is naturally uncontradicted, as it is the testimony of the highest officer having charge of the procurement of clothing. It is true, of course, that the Depot Quartermaster himself could not execute contracts for the manufacture of specific quantities of clothing. All such contracts had to be executed by what was known as the contracting officer, who was merely a formal official, generally having no knowledge of the contract itself which was recommended, awarded and written up in the course of a routine established by the procurement section. While contracts of this character were in contemplation of the Depot Quartermaster to be given to plaintiff and were given without a single case of disapproval up to the time of the Armistice, the contract which is sued upon is not of this character, but is a contract which some one in the department of which General Goethals was the head would have had power to formally execute. It would be practically impossible in the enormous machine which constituted the War Department at this time to show that any specific contract was authorized; that is, that a certain individual was specifically authorized to make it and execute it. If this had been necessary, as General Goethals points out, the army never would have been supplied with clothing. It seems to us that no other conclusion can be reached from General Goethals' testimony than that the arrangement, agreement, made by the Depot Quartermaster was authorized. If it was not, he was the

man to say so and he was on the stand and subjected to cross-examination and his testimony was just to the contrary. We therefore ask that the finding as originally requested be made.

(f) In the last sentence of our Request No. VIII (R. 194) we asked the following finding:

> "Said Benedict M. Holden reported said agreement to his superior officers at Washington at the time he made the same."

We submit this request and call attention to the uncontradicted testimony of the Depot Quartermaster (R. 24-25, answers to Questions 80 and 82):

> "* * * I reported the contemplated change to my superiors in Washington. I had meetings in Washington at which we would make report of the production within our zones and the conditions affecting the production, not only in clothing but in everything, and I reported the contemplated increase in Jacob Reed's Sons' plant, reported it as increased production from this particular firm and a possible relief, a possible channel through which we might obtain relief from obnoxious contractors in that zone; and after talking with Mr. Wilson I talked with the gentlemen in Washington and New York; and at a subsequent meeting I stated my conclusions to him. I had received information that if the war was over in a short time, which none of us on this side of the water anticipated, that we would probably have an army of occupation, that we would unquestionably require a large quantity of equipment, particularly of uniforms and overcoats, and I repeated this information to Mr. Wilson with a view of convincing him that it was the part of wisdom to make the investment which this increased plant required.

* * * * *

"* * * There was no question in my mind at the time I talked to Mr. Wilson, at the time we had these interviews, but what this firm would receive contracts from the United States Government sufficient to compensate them for making this investment. I intended that they should receive them, and the War Department intended that they should receive them—I mean by the 'War Department' so far as it was represented by those gentlemen who came in contact with me in the performance of my duties."

(g) We also request the following finding:

"Upon his arrival in Philadelphia, Mr. Holden learned that the Fleischer Yarn Company had just completed a large factory containing 400,000 square feet. He notified them that he would take it over for the Government, which he did. Several months later he agreed with them on a rental basis for its use. He also appointed two officers to negotiate for the purchase of machinery and equipment for the plant, which they did without any other authority. Under his direction they took the machinery and installed it and no agreement was made for its payment until after the Armistice. These acts were done under his general authority and ratified by the Secretary of War, through General Goethals" (Holden, R. 17, Qs. 39-44).

This finding, we think, is important and relevant upon the question of authority. It was not requested in our original request because we deemed it covered by the general finding requested on the subject of authority. If the general finding is not made as originally requested and as now again requested in finding (g), then we submit that this finding is most relevant; and, fur-

ther, that additional findings should be made covering the facts as to the functioning of Depot Quartermasters, their wide authority and duty in securing increased production as detailed in the testimony of General Goethals. The testimony on which this finding is based is as follows:

> "39. Question. Did you establish a Government factory over there yourself, Mr. Holden?
>
> "Answer. I did; the Fleischer Yarn Co. had just completed a large factory with something in excess of 400,000 square feet of manufacturing space—about that. The first week I was in Philadelphia I saw this factory, went over it, notified the owners that I would take it over for the Government, and agreed upon a rental with them later; and came back to my office and telephoned General Goethals what I had done; appointed Colonel Linsley and some one else to negotiate for the purchase of machinery and equipment. I think it was two months later that we agreed upon the rental; that is, by mutual agreement; and after the Armistice was signed we paid for the machinery. I produced approximately 4,800 to 5,000 garments a day in that factory.
>
> "40. Question. How do you mean by 'paid for the machinery after the Armistice'?
>
> "Answer. Well, we just took the machinery and installed it. The contracts for the purchase of it or the lease for it hadn't been settled. We used them; we couldn't agree with the factory that made this machinery as to whether we would buy it or lease it, and so we just took it and used it.
>
> "41. Question. How about the building, did you lease it?
>
> "Answer. We occupied it and after we had been in there and equipment was installed and I think in operation we agreed as to the terms of the

lease. That was signed up. The date of the lease shows for itself it was some considerable time.

"42. Question. Who signed that lease?

"Answer. I think it was my contracting officer —the contracting officer that I appointed.

"43. Question. You negotiated it yourself?

"Answer. Well, I said, 'Take over the building,' and I gave the orders to take it over; and the negotiating of the lease—I might have been present at the conferences but I didn't attend to the detail. I approved it.

"44. Question. You set the machinery in motion so that the deal went through?

"Answer. Yes; I was responsible for it."

II.

The Motion as Addressed to the Conclusion of Law.

Plaintiff respectfully represents that the conclusion of law as made by the Court on the original trial, in view of all the evidence in the case, is erroneous, in that the Court should have rendered judgment for the plaintiff. On this branch of the motion plaintiff resubmits its original brief and again calls attention to the fact that the Dent Act specifically provides for compensation where an agreement has been entered into, as therein provided, for the production, manufacture or acquisition of equipment, materials or supplies, or for services or for facilities, and that the contract as made certainly comes within this language; that it was fully performed by the plaintiff under the supervision of Government officials and was used for a time by the Government.

The fact that the agreement for compensation contemplated the payment of this compensation by the award of contracts is immaterial; such a method was

highly advantageous to the Government. The fact that the Government did not see fit to make this compensation in full in the way that it was contemplated does not relieve it from the duty to compensate. If one agrees to pay rent in wheat, he is not relieved from his obligation because he has no wheat or does not choose to pay it in that manner. If he does not pay it in the manner agreed upon he must pay in money.

The Court will also note that there is not one word in the record to show that the Government could not have used this factory as originally contemplated, or that the termination of the war made it unnecessary for the Government to continue the manufacture of uniforms.

We think as to the duty to pay the cost of equipping this factory the case cannot be distinguished from the case of *Price Fire & Waterproofing Company vs. The United States,* 56 Ct. Cls. 502, affirmed in 261 U. S. 179. The fact that plaintiff's expense was incurred in preparing to perform contracts which were to be given it, of the same class of contracts upon which it was then working, can not distinguish the case from expense incurred in preparing to perform a single contract which had not been executed in the manner provided by law. The only difference would be that the first case would be stronger; the principle is identical.

In our original brief we did not discuss the *Baltimore & Ohio* case, 261 U. S. 592, because we thought—and still think—that the facts in that case are so utterly different from the one at bar that it has no application. The *Baltimore & Ohio* case establishes no new principle of law whatever. This is perfectly apparent from an examination of the authorities cited by the Court in its opinion. We call attention to the second footnote of the opinion, citing 2 *Abbott's Trial Evidence,* 913, and

cases there cited as to the character of evidence by which an implied agreement to pay for services is generally established; and our contention is that the facts in this case show not only an express agreement, but also show a state of facts from which an agreement would be implied. As to the character of the facts, the necessity of the arrangement at the time it was made, its benefit to the Government, we again call attention to the testimony of General Goethals.

Statement.

(Omitted in printing as it refers to the brief below.)

Conclusion.

Plaintiff respectfully moves, therefore, that a new trial be granted, the case reopened, amended and supplemental findings made and judgment rendered for plaintiff as hereinbefore asked.

Respectfully submitted,

FRANK DAVIS, JR.,
Attorney for Plaintiff.

WM. D. HARRIS,
Of Counsel.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 63

JACOB REED'S SONS, INC., APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION

The opinion of the Court of Claims in this case (R. 9 to 12) is reported in 60 Court of Claims 97.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1925. (R. 12.) A motion for a new trial was duly entertained and overruled on March 16, 1925. (R. 13.) A petition for appeal was filed March 31, 1925, and allowed on April 6, 1925. (R. 13.) Jurisdiction to allow and entertain such appeal is conferred by Sections 242 and 243 of the Judicial Code, which were in effect at

the time the appeal was taken, all of such action being prior to the taking effect of the Act of February 13, 1925. (Chap. 229, 43 Stat. 936.)

STATEMENT

This is a suit against the Government to recover damages for an alleged breach of contract, it being contended by the appellant that duly authorized officers of the Government agreed with appellant that if appellant would lease and equip certain premises in the city of Philadelphia as a plant for the manufacture of Army uniforms the Government would give to appellant contracts for the manufacture of uniforms in sufficient quantities to permit appellant to amortize the cost of the lease and equipment; it being also contended that as a result of said agreement appellant did lease and equip the factory, and that after the Armistice the Government cancelled existing contracts and failed to give any additional contracts, thereby preventing appellant from amortizing such cost, as a result of which appellant has suffered damage in the sum of $43,756.24. Appellant contends that this is a valid and binding contract, coming under the provisions of the Act of March 2, 1919 (Chap. 94, 40 Stat. 1272) (Dent Act).

The facts as found by the Court of Claims are as follows: The appellant is a corporation (R. 6), and prior to July 15, 1918, had been engaged in the manufacture of Army uniforms for the Government (R. 6). On such date appellant was

using as a cutting plant certain premises in Philadelphia, and was using three or four other premises, in which, after the cutting was done, the other work of the manufacture of the uniforms was completed. (R. 6.) Early in the summer of 1918 the situation generally with reference to the production of Army uniforms was critical, and it was necessary to immediately arrange to provide uniforms for four million men by July 1, 1919. (R. 6.) The manufacturing situation of such uniforms in the city of Philadelphia was very unsatisfactory to the Government. Production was not up to minimum requirements, contracts were scattered among many manufacturers, and there was much dishonesty, waste, and inefficiency. (R. 6.) Appellant, however, was regarded as one of the best contractors with which the Government was dealing. (R. 6.) In April, 1918, General Goethals, Assistant Chief of Staff, Division of Purchase, Storage and Traffic of the Army, having charge of the procurement of such supplies, assigned Benedict M. Holden, a civilian (and an able lawyer), as Depot Quartermaster at Philadelphia "to increase production and to eliminate dishonest and unsatisfactory contractors." (R. 7.) "As such depot quartermaster it was his duty and he had authority to do everything possible to expedite production of uniforms to meet the program which had been laid out for the United States Army." (R. 7.) By letter dated May 8, 1918, to appellant, signed by Capt. Weinberg as Assistant

to the Depot Quartermaster in Philadelphia, appellant was advised that by letter dated May 6, 1918, from the office of the Quartermaster General they had been instructed to have appellant take up with the office of the Depot Quartermaster in Philadelphia all matters pertaining to appellant's contracts, or any business that they might have with the Quartermaster Corps in reference to contracts, and that it would not be necessary for appellant to correspond with the Quartermaster General's office unless so advised. (R. 9.)

"Benedict M. Holden, Depot Quartermaster at Philadelphia, while acting as such was an agent of the Secretary of War." (R. 9.)

Holden urged appellant in every way to increase its production. He required all contractors to install storerooms at places where cutting was done in order that material belonging to the Government might be kept under lock and key. He also required one of appellant's places to be discontinued on account of the fire risk. (R. 7.) Appellant could not provide the storeroom at its cutting plant without decreasing production. The discontinuance of one place on account of the fire risk also would decrease production. The only way to meet these demands and to increase production would be to secure new quarters and concentrate the manufacture. Appellant, being desirous of complying with these demands of the Government, sought suitable space and ascertained that it could lease certain premises that were desirable and would permit the

increasing of production, the establishment of a new storeroom, and the abandonment of the plant discontinued because of the fire risk. This space could only be procured by executing a lease for three years and if procured it would require the installation of necessary and proper machinery. (R. 7.)

On or about July 15, 1918, the plaintiff (appellant) reported the above facts to Benedict M. Holden, Depot Quartermaster at Philadelphia, and stated to him that the taking over and equipment of the portion of the building at North Sixth Street would involve the expenditure of a considerable sum of money, and that it did not feel justified in going ahead without some definite assurances on the part of the depot quartermaster that it would receive a sufficient number of contracts to at least compensate it for the outlay and obligations which it would have to incur. The depot quartermaster wanted to know what it would cost to rent the portion of the building and to equip it. The plaintiff (appellant) told him that such a plant would cost from $75,000 to $100,000. The depot quartermaster urged the plaintiff (appellant) to increase its capacity and stated that he was satisfied that the plaintiff (appellant) would receive contracts from the United States Government sufficient to compensate it for making the investment. The plaintiff (appellant) suggested that the war might end. The depot quartermaster then said, " If the war stops, we will be obliged

to keep an army of occupation in Europe for some time to come, and this army of occupation will need uniforms." He further stated that contracts would be placed with the plaintiff (appellant) which would fully reimburse it for its proposed expenditure. (R. 7 and 8.)

Thereupon appellant executed the lease and equipped the plant. It was completed and ready for operation about the middle of September, 1918. It was inspected and approved by officers connected with the Philadelphia depot, both during construction and after completion. As soon as completed the Government immediately awarded contracts to appellant and said plant was used in the manufacture of uniforms until the date of the armistice, when appellant was ordered to stop manufacturing. Thereafter, although appellant was ready, willing, and able to devote said factory to the manufacture of uniforms and requested additional contracts, no further contracts were given to it. (R. 8.) After the armistice, appellant endeavored to have the Government take the factory off its hand and pay its losses. The Government failing to do so, appellant disposed of the same at a loss of $43,756.24. (R. 8.) Appellant filed its claim under the Dent Act with the Secretary of War. The War Department Claims Board found it was entitled to relief, but on appeal to the Secretary of War the claim was denied. (R. 8.)

> All matters connected with the origination, making, and performance of all contracts of the plaintiff (appellant) for the manufacture of uniforms were taken up with the depot quartermaster at Philadelphia, and plaintiff (appellant) had no dealings with regard to any of said contracts with any other official. All such contracts were executed on behalf of the Government by the officer designated in the contract as contracting officer and designated by the depot quartermaster at Philadelphia. (R. 9.)

Upon the above facts the Court of Claims held that there was no agreement by the Government to pay any losses that appellant might sustain in equipping this factory, and that if there was such an agreement it was beyond the authority of the officers of the Government to make the same, and that the Dent Act did not validate such agreement or extend the authority of the officers; that such Act only gave validity to agreements informally made, which agreements were within the authority and power of the officers to enter into.

THE STATUTES

The pertinent portions of the Act of March 2, 1919 (Chap. 94, 40 Stat. 1272) are as follows:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the pres-

ent emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law * * *.

ARGUMENT

Upon the facts found by the Court of Claims two questions arise:

1. Was there any agreement by the Government, or officers thereof, to reimburse appellant for any losses it might sustain in leasing and equipping the factory for the manufacture of army uniforms?

2. If there was any agreement concerning the leasing and equipping of this plant, was such agreement within the authority of the officers who undertook to make the same?

Appellant in its brief has quoted parts of evidence which are not made a part of the findings of fact by the court below and has also made as an appendix to its brief parts of the findings of various War Department Claims Boards. The appendix also includes appellant's motion for new trial in the court below. None of these matters are included in the findings of fact, which are conclusive in this Court. These matters have no place in the presentation before this Court and are not a proper part of appellant's brief.

I

THERE WAS NO AGREEMENT

There was no promise by the Depot Quartermaster. The Government wanted an increase of production. The appellant could not increase production without incurring additional expense. Before doing so it wanted the best information which it could obtain as to the probability of being able to amortize such expense. The Government never *agreed* that it would either give appellant contracts, out of which it could amortize the same, or that it would reimburse appellant for such expenditures if they were not so amortized. The officers of the Government merely gave to appellant the knowledge which they then had concerning the probable requirements of the Government. They could not bind the Government to continue the war. They did not undertake to do so. They merely ex-

pressed their opinion that if the war continued, appellant would be given additional contracts, and that if it did not continue, there would be the need for army uniforms by the army of occupation. Upon the information and opinion so given, not upon any *agreement,* appellant invested the money upon the hope that it would be reimbursed by profits from future contracts. It took this chance, and it lost. The assurances so given to the appellant were too vague and general to be considered stipulations of a contract. It is evident that they were not made or received as such.

II

THE AGREEMENT CLAIMED WAS NOT WITHIN THE AUTHORITY OF THE DEPOT QUARTERMASTER

Appellant claims that the agreement was "that the plaintiff (appellant), at the request and insistence of the Depot Quartermaster, and upon his promise that contracts would be placed with plaintiff (appellant) which would fully reimburse it for the expenditure, rented and equipped a factory in which to perform Government contracts." (Appellant's brief, pp. 7 and 8.) At page 14 of its brief appellant states the promise or the contract to be the following: "The promise was that the Government would make sufficient use of the factory to amortize the cost thereof; that plaintiff (appellant) would be reimbursed for any loss." Assuming that there was such a contract, it would be invalid because it was not made by any officer au-

thorized by law to make it. The appellant claims that there was a contract by the Government to enter into future contracts. No officer of the Government has authority to bind the future action of himself or his successors in office with reference to the letting of contracts.

Section 3732, Revised Statutes, as amended by the Act of June 12, 1906 (Chap. 3078, 34 Stat. 240, 255), provided that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year." The alleged agreement contemplated contracts by the Government looking far into the future, beyond the necessities of the current year, beyond the current appropriation Acts, and according to the findings of fact by the Court of Claims in the event that the war should end, it looked to the necessities of the army of occupation.

The following statutes are likewise to be considered:

> All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate

delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals. (R. S. Sec. 3709.)

Hereafter all purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster's Department and by the Commissary Department for immediate use shall be made by the officers of such Department, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided also*, That all purchases of said supplies, except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids. (July 5, 1884, c. 217, 23 Stat. 107, 109.)

Hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments, and posts of

> the Army and of the branches of the army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; * * *. (March 2, 1901, c. 803, 31 Stat. 895, 905.)

In the absence of war or other great national emergency, uniforms must be manufactured under contracts which are let on public bids. Nobody knew how long the war would last. The alleged agreement upon the part of the Government was not a contract for the purchase of uniforms but looked far beyond the needs of the current year, the needs of the war, and to the needs of the army of occupation. When the war ceased the usual mode of letting public contracts would be restored. Unless the appellant would submit the lowest and best bids the contracts could not then be let to it. It was beyond the power of any officer of the Government to agree to do so. The findings of fact do not show that Mr. Holden had any authority to make the contract which appellant alleges exists. In the absence of such a finding the appellant's case is not sustained. The facts as found do not show that the Depot Quartermaster had any authority whatever to agree to pay for leasing and equipping factories. He may have had authority to contract for the present manufacture of uniforms, but it is not contended that the breach of any such a contract is the basis of the present action. Author-

ity to contract for uniforms does not include authority to contract for the erection of factories at the expense of the United States.

It is a familiar principle of law that all officers of the Government are agents with limited authority and that all persons dealing with them are chargeable with notice of all such limitations. (*Hume* v. *United States,* 132 U. S. 406; *Whiteside* v. *United States,* 93 U. S. 247.)

It is quite clear under the decisions of this Court (See *B. & O. Railroad Co.* v. *United States,* 261 U. S. 592) that in order that relief may be granted under the Dent Act there must be, among other things, (1) a contract, express or implied, upon the part of the United States, and (2) such contract must have been made by officers with authority to enter into the same. There are other requisites under the Dent Act, but the two above mentioned are wholly lacking in this case. The Dent Act was designed to bring relief to those who had entered into contracts within the scope of the authority of the officers who undertook to make them, but which had not been executed with the required legal formality. (*B. & O. Railroad Co.* v. *United States,* 261 U. S. 592.)

Appellant contends that this case is within the authority laid down in *Price Co.* v. *United States,* 261 U. S. 179. The facts in the two cases are entirely different. In the Price case an agreement existed, which was within the authority of the officers who made it. In the case at bar there was

neither a contract nor authority of the officers to make any such contract as is claimed. The only question decided by this Court in the Price case was that the claimant was not entitled to recover its expenses in regaining its commercial business after the termination of Government work.

For the reasons above set forth it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Respectfully,

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.

NOVEMBER, 1926.

○

SUPREME COURT OF THE UNITED STATES.

No. 63.—October Term, 1926.

Jacob Reed's Sons, Inc., Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[January 24, 1927.]

Mr. Justice Brandeis delivered the opinion of the Court.

This is an appeal under § 242 of the Judicial Code from a judgment for the United States entered by the Court of Claims, before the effective date of the Act of February 13, 1925, c. 229, 43 Stat. 936. The suit was brought under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, by a manufacturer of clothing to recover the actual loss incurred in renting and equipping a factory required, during the World War, in order to make uniforms for the Government, and for which factory there was no use after the armistice. The claim, as alleged in the petition, is that the depot quartermaster at Philadelphia agreed that if the plaintiff would rent and equip the factory, "the United States, through the Secretary of War, and the contracting officer, the Depot Quartermaster, would award sufficient contracts to plaintiff which at a fair margin over cost, would enable it to amortize the cost of said lease, machinery and equipment," and that if sufficient contracts were not awarded to amortize the plant, the United States would save plaintiff harmless from any loss.

The Court of Claims did not find as a fact that any such contract express or implied was made. It found that the depot quartermaster, while urging plaintiff to rent and equip the factory, "stated [orally] that contracts would be placed with plaintiff which would fully reimburse it for the proposed expenditure." The court concluded, as matter of law, that there was no contract; that, if the contract had in fact been made as alleged, it would not have bound the Government, because, so far as the record disclosed, the depot quartermaster had no authority so to bind it; and that, as there

was no agreement, and also because such authority was lacking, the Dent Act did not afford a remedy, 60 Ct. Cls. 97.

The contracts for uniforms given the plaintiff were cancelled by the Government. The right to cancel these is not questioned; and no claim is made here for compensation for cancelling them. Compare *Russell Motor Car Co.* v. *United States,* 261 U. S. 514; *College Point Boat Co.* v. *United States,* 267 U. S. 12, 15. The argument here consisted mainly of an effort to show, by reference in the brief to portions of the evidence introduced before the Court of Claims, that the contract sued on was made as alleged and that authority to make it had been conferred upon the depot quartermaster. The evidence is not before us; and we must accept the findings of the Court of Claims. *Rogers* v. *United States,* 270 U. S. 154, 162. Moreover, it is doubtful whether even express authorization could, under the then existing statutes, have conferred upon anyone the power to make the contract which the plaintiff has attempted to prove. See Rev. Stat. § 3732, as amended by Act of June 12, 1906, c. 3078, 34 Stat. 240, 255; Rev. Stat. § 3709, Act of July 5, 1884, c. 217, 23 Stat. 107, 109; Act of March 2, 1901, c. 803, 31 Stat. 895, 905.

The decision of the lower court was clearly correct. The Dent Act gave a remedy upon contracts irregularly made, not upon contracts made without authority. Nor did it give a cause of action on dealings which did not ripen into a contract. *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 385; *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592, 596. Compare *Price Fire & Waterproofing Co.* v. *United States,* 261 U. S. 179; *United States Bedding Co.* v. *United States,* 266 U. S. 491, 492; *Merritt* v. *United States,* 267 U. S. 338, 340.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.